

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE, CRIMINAL JURISDICTION
CRIMINAL APPEAL NO. 783 OF 2001

01.	Subhash Parashram Barge] Age 26 years, occup.] Coolie (Labour),]	
02.	Sou Mandakini Parshram] Barge, Age about 48] years, occup. Household]	
	Both r/of Jinti Peth,] Koregaon, Taluka Koregaon] District Satara.] (presently in Central] Prison, Yerwada, Pune)]	Appellants/ original accused Nos. 1 and 2.

Versus

The State of Maharashtra] through Koregaon Police] Station, Satara.]	Respondent
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Shri D.G.Khamkar, Advocate for Appellant No. 1. Shri Dilip Bodke, Advocate for Appellant No.2. Smt. A.M.Shringarpure, A.P.P. for Respondent.	
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Coram: N. V. Dabholkar, and
Smt.V.K.Tahilramani, JJ.
Dated: January 31, 2006.

Final Judgment (Per: Dabholkar, J.)

1. Although, the husband and his parents were tried by II Additional Sessions Judge Satara for the offences punishable under Sections 498-A and 302 r.w. 34 of IPC, at the conclusion of Sessions Case No. 6 of 2000, by his judgment and order dated 10.08.2001, the learned trial Judge has acquitted father-in-law Parashram/original accused No.3 of both the charges.

Husband Subhash is held guilty on both counts and mother-in-law is said to have been in common intention so far as murder is concerned. Consequently, the husband and mother both are sentenced to suffer life imprisonment and fine of Rs.500/- each i/d S.I. for two months so far as offence under Section 302 r.w. 34 of IPC. Husband Subhash is further sentenced to R.I. for one year and fine of Rs.300/- i/d R.I. for two months for offence under Section 498-A of IPC. His substantive sentences are ordered to run concurrently.

. By the present appeal under Section 374(2) of Cr.P.C., 1973, son and mother challenge the said conviction and sentence.

2. According to prosecution story, the incident in question took place on 21.9.1999 at about 6.00 a.m. Victim of the incident viz. Manisha was married to accused No.1 Subhash on 15.11.1998 at Bhairoba Temple, Koregaon. An amount of Rs.10,000/- was paid by way of dowry. A tola of gold, cot, mattresses, utensils and other usual articles were also offered as gift.

. After marriage, Manisha resumed cohabitation with accused and initial period of 5/6 months was without trouble. It is the claim of P.W.5 Chandrakant (father of the deceased) that accused started

ill-treating Manisha after lapse of six months since the marriage. She was not allowed to use soap, she was not provided adequate food, she was prevented from visiting neighbours. On one occasion, when Manisha had returned to her father, father claims to have seen weal marks on the person of Manisha. Manisha had complained of her husband beating her under the influence of liquor and by expressing suspicion about her fidelity. Father also claims that he had taken mediators to the place of husband and tried to prevail upon the husband and his relatives so that they should treat Manisha properly.

. On 21.09.1999, father learnt about his daughter having sustained burn injuries from a neighbour of accused. He proceeded to Koregaon (place of the husband) and reached there at about 9.30 a.m. He learnt that Manisha was shifted to Civil Hospital, Satara. He proceeded further and visited victim Manisha at Civil Hospital Satara. It is the claim by the father that Manisha narrated of being starved for last two days, she also narrated that her mother and father in law caught her and husband had immolated her. The deposition of the father, thus, is oral dying declaration on record.

. In fact, statement of Manisha recorded by P.W.3 Yuvraj Tate, A.S.I. which is at Exh.19 is treated as F.I.R. and crime was registered by Satara City

Police Station on the basis of the same. Subsequently, investigation was transferred to Koregaon police station since the incident had occurred within the territorial limits of that police station. On completion of investigation, P.W.6 Balkrishna Shinde, P.I. had filed the charge-sheet in the Court of J.M.F.C. Koregaon and upon committal, trial ended in conviction by Sessions Court, Satara, as described above.

3. Evidence of P.W.2 Dattatraya Mane (Awal Karkoon/Executive Magistrate) and P.W.3 Yuvraj Tate who was then attached to Satara police station as Hawaldar and therefore, posted on duty at Civil Hospital Satara, is of greatest importance. Both these witnesses have recorded statements of victim Manisha (Exh. 17 and 19 respectively). Shri. Mane has recorded between 12.00 to 12.15 hrs and Shri. Tate has recorded between 09.25 to 09.55 hrs both on 21.09.1999. As already stated, P.W.5 Chandrakant Phalke, is the father of deceased Manisha. Dr. Shubhangi Patil, Medical Officer attached to Civil Hospital Satara was present and she has certified the fitness of the patient to make statement on both occasions i.e. while recording Exh. 17 and 19. Dr. Shubhangi has also performed post mortem and in her report (Exh.26) she has opined that Manisha died due to septicaemic shock due to 51% superficial to deep burns. P.W.1 Dnyandeo is witness to spot panchanama (Exh.14)

and P.W.6 Balkrishna Shinde, P.I. Koregaon police station is investigating officer.

. In this matter, accused has examined one Nanda Barge as defence witness. Nanda is not only neighbour but she is also related to accused No.1. Since, she admits that her husband is the uncle of accused No.1. According to Nanda, on the date of incident, on hearing shouts of woman from the house of accused, she had proceeded to the location, she found that Manisha had suffered burn injuries and on enquiry, Manisha told her that while she was keeping the pot on the earthen fire place (-----), one side of the same collapsed, her saree end, therefore, caught fire. Thus, Nanda had deposed about exculpatory dying declaration of victim Manisha suggesting Manisha having suffered burns as a result of accident.

4. During the statements under Section 313 of Cr.P.C. both the appellants admitted the relationship. They also admitted that Manisha died as a result of burn injuries but all other averments of the prosecution are denied. The composite written statement is filed by three accused persons at that stage. In the said written statement, story of Manisha having suffered burn injuries as a result of accident is narrated thus;

. While accused No.1 had finished his morning duties, Manisha was trying to place a water pot on the fire place for heating the water for bath. In the process, left side of earthen fire place collapsed and while she was trying to control falling utensil, end of her saree caught fire. Accused No.1 Subhash raised shouts, he tried to extinguish the fire by his hands and in the process, he suffered burn injuries to his hands and face. Neighbours informed the parents of Manisha. It is also claimed that the couple was staying in ancestral house whereas parents were staying in the newly constructed house. Father of Manisha initially expressed suspicion and is now making false allegations of accused persons having murdered her. Thus, according to defence, Manisha suffered burns by an accident and accused are not guilty of murder.

5. For the reasons discussed in paras 10 to 13 of his judgment, the learned trial Judge was inclined to believe dying declaration Exh.19 (as recorded by Hawaldar Tate). The learned Judge found that it was recorded before 10.00 a.m. i.e. before arrival of parents of Manisha and therefore, there was no opportunity for any tutoring. The trial court also felt that evidence of P.W.5 Tate was supported by Medical Officer Dr. Shubhangi (P.W.4). Merely because the same was not recorded in question-answer form that was not

sufficient to look to the statement with disbelief. Other dying declaration Exh.17 is considered and dealt with by the trial Court in para 14 and for similar reasons i.e. evidence of recording Officer Shri Dattatraya Mane (P.W.2) supported by Medical Officer Dr. Shubhangi, the learned Judge found the same to be reliable. The evidence of defence witness Nanda regarding oral dying declaration suggesting accident is discarded by the trial Court in the light of Exh.39. Exh.39 is medical case record of victim Manisha and history of burns as recorded in the medical papers is "suicidal burning". In view of the conflicting theories propounded by the defence, trial court was not inclined to place any reliance upon the evidence of defence witness Nanda.

. Since no overt act is attributed to father-in-law, he was exonerated of both the charges. In fact, accused No.1 Subhash is convicted under Section 498-A of IPC merely because he expressed suspicion against fidelity of deceased Manisha and thus, the husband is held guilty of two charges whereas mother-in-law of only charge of murder.

6. Heard Advocate Shri Khamkar for appellant No. 1, Advocate Shri Dilip Bodke for appellant No. 2 and

Shri A.M.Shringarpure, APP for Respondent No.3-State. The two lawyers representing the appellants have taken us through the entire evidence and we intend to deal with their submissions, during the course of discussion of reasons for our conclusions, in stead of enlisting the submissions, by an independent paragraph.

7. First of all, we intend to deal with the finding of guilty as recorded by learned trial judge, so far as offence punishable under Section 498-A of IPC is concerned. The issue is dealt with by the learned Sessions Judge quite summarily in paragraphs 21 to 23 of his judgment. Chandrakant, father of the deceased (PW-5) has devoted entire paragraph 2 of his chief examination towards narrating ill-treatment to his daughter. He has deposed to have heard complaints from his daughter deceased Manish against the accused persons. According to him, husband of the deceased used to beat her under influence of liquor and by suspecting her fidelity. The accused did not allow her to use soap, did not give adequate food and did not allow her to go to the neighbours. He also boasted to have noticed weal marks on the person of the deceased Manisha, when he had returned to parents, after being beaten by the accused. He also claimed that, he had tried to persuade accused persons with the assistance of 2-3 mediators. Unfortunately, when we refer to his

cross examination, all this narration of the father has turned out to be at the cost of improvement over and above his police statement.

. Learned Judge has also referred to stories of ill-treatment, as have occurred in the two dying declarations. In Exh. 17, Manisha has stated that her in-laws used to abuse her and husband used to beat her under influence of liquor, because of suspicion about her fidelity. Other dying declaration (Exh.19) contains allegations, such as, refusal of use of soap and coconut oil and conduct of accused No. 1 beating her due to suspicion about fidelity.

. Learned trial judge in paragraph 22 of his judgment, observed that, so far as accused Nos. 2 and 3 are concerned, there are no specific charges, which would fall within the ambit of 'cruelty' as defined in explanation to section 498-A IPC. According to him, even if allegation to the effect that she was denied use of soap and coconut oil etc are believed to be true, those cannot attract term 'cruelty' as contemplated by section 498-A IPC and there are no allegations against parents that they ever expressed suspicion against her fidelity. Hence, learned Judge has exonerated the parents-in-law of deceased Manisha, of the charge under section 498-A IPC. The State having preferred no appeal

against the said acquittal, we are not required to reconsider the acquittal, as recorded by the trial judge against accused Nos. 2 and 3 on that count.

. So far as accused No.1-husband is concerned, learned trial judge felt that his case stood on different footing. Expressing an opinion that, the conduct of the husband in suspecting character of the wife, was detrimental to the mental health of the woman, as no lady would be able to tolerate slur on her character, learned Judge held that, this conduct of accused No.1 comes within clutches of section 498-A IPC.

. At the commencement of the argument, we have, on our own, informed the lawyer for appellant No.1 that, he need not argue for acquittal, so far as Section 498-A IPC is concerned. The definition of 'cruelty' as embodied in the explanation to section 498-A IPC, contemplates two types of situations, which attract penal consequences under Section 498-A. Firstly, either mental or physical treatment by the husband, or his relatives to the wife should be of such a nature that the wife is driven to commit suicide. In the matter at hands, prosecution has come with a case of homicide and not suicide. Therefore, prosecution story, even if accepted as it is, the first clause of explanation to

Section 498-A IPC, is not applicable. Harassment or ill-treatment of the wife by husband and his relatives comes within the clutches of Section 498-A, even though the wife is not psychologically driven to commit suicide, provided such harassment / ill-treatment is aimed at coercing the wife or her relatives for the purpose of satisfaction of illegal demands of the husband and/or his relatives. In the matter at hands, it is not the case of the prosecution that ill-treatment was aimed at coercing the wife or her relatives to satisfy any illegal demand of husband and/or his relatives. In fact, there is no averment of husband, or his relatives making any demand. The contention that the husband was drunkard or that he expressed suspicion against character of the wife and, therefore, he used to beat her would not fall within the ambit of definition of 'cruelty'. Appeal to the extent, it challenges conviction u/s 498-A IPC, therefore, succeeds.

8. Although the husband and his mother have engaged independent lawyers, realizing that the dying declarations on record, couple recorded and one oral, being main stem of the prosecution story, the two lawyers have assailed the dying declarations in their own way. We are aware that, if we arrive at a conclusion that the dying declarations are not reliable, being convinced by the submission of counsel for either

appellant, the benefit would go also to other appellant.

9. Dying declaration (Exh.19) is recorded by the then Havaladar (now A.S.I.) Yuvraj Tate (PW-3) on 21.9.1999 between 9.25 am to 9.55 am. (The incident is said to have occurred on the same day at 6.00 am. This dying declaration is treated as FIR and offence was registered on the basis of the same, by Satara City Police Station under zero number and subsequently transferred to Koregaon Police Station, which registered it as CR No.85/1999 at 18.05 hours on 21.9.1999. Shri Tate was on duty at civil hospital, Satara, from 9.00 am to 9.00 pm on that day. Police Constable Ghodke was his companion on duty. When Manisha was admitted to the hospital, PW-3 Tate was called by Casualty Medical Officer (CMO) and his attention was drawn to the burnt patient (Manisha) admitted in the hospital. Accordingly Shri Tate himself, Police Constable Ghodke and doctor went to the casualty room, doctor examined the patient and informed Shri Tate that manisha was in a position to make a statement. He, thereafter, recorded statement of Manisha, as at Exh.19. Although PW-3 Tate has not so deposed, Exhibit 19 within itself contains a recital that the statement was read over and was admitted by her to be correctly recorded. PW-3 Tate has denied suggestion that he has prepared the dying declaration at the instructions of parents of the patient.

. Dying declaration (Exh.17) recorded by Tahsil Awal Karkoon Shri Mane (PW-2) and it was second in time and was recorded between 12.00 noon to 12.15 p.m. According to Shri Mane, police constable had come to invite him for recording dying declaration at civil hospital, at about 11.30 a.m. After permission from his superior, he reached civil hospital, within five minutes. On reaching hospital, he contacted the Medical Officer. The Medical Officer accompanied him to the burn Ward. Nobody was near the patient at that time. The Medical Officer ascertained, by asking some questions to the patient, that the patient was in a condition to make statement. Thereafter, he recorded statement between 12.00 noon to 12.15 p.m. Shri Mane has also produced on record at Exh.16, a letter of request from P.S.O., Satara Police Station.

. The prosecution has not left the matter, by relying upon depositions of two recording officers. It has also examined Dr. Shubhangi Patil (PW-4), who had certified fitness of the patient to make a statement on both the occasions. Deposition of Dr. Shubhangi is at Exhibit 25. According to her, she was Casualty Medical Officer, from 8.00 a.m. to 2.00 p.m. at the civil hospital on 21.9.1999. Manisha was referred by Koregaon rural hospital and was admitted as burnt patient, when

she was on duty. She had examined the patient immediately after admission at 9.15 a.m and had informed the police, whereafter the police recorded statement of the patient in her presence, while patient was conscious and well-oriented. She confirms that the police man recorded the statement (Exh.19) only after consulting her. She has also deposed that at about 12.00 p.m., the Magistrate had come to record the statement and had consulted her. She had accompanied the Magistrate to the bed of the patient and before recording of the statement by the Magistrate, she had informed the Magistrate that the patient was conscious and oriented. Deposition of Dr. Shubhangi is duly supported by existence of her endorsement on both the dying declarations (Exhs.19 and 17). She has put her endorsement only once, to the effect that the patient is conscious and in a condition to give statement, between 9.25 a.m. to 9.55 a.m., and 12.00 noon to 12.15 p.m.

9. Shri Bodke, learned Advocate for appellant No.2, tried to assail Exhibit 19, by submitting that the prosecution has not examined Police Constable Ghodke, who had accompanied PW-3 Tate, when Tate recorded the dying declaration. It is settled legal position that evidence is to be weighed and not counted. After all, Police Constable Ghodke was not going to depose anything

different than what PW-3 Tate deposed. In fact, Tate himself recorded the statement and thus the prosecution has led the best possible evidence. Non-examination of his companion Shri Ghodke is, therefore, not sufficient to look to the dying declaration with suspicion.

. Because none of the recording officers specifically deposed that they themselves had satisfied about the fitness of the patient to make statements, Advocate Shri Bodke argued that the statements cannot be treated as reliable piece of evidence and for the purpose, Shri Ghodke placed reliance upon judgment of the Hon'ble Apex Court in the matter of **Laxman vs. State of Maharashtra, 2002 AIR SCW 3479**. In fact, we are of a considered view that reliance placed on the said judgment by Advocate Shri Bodke, is misplaced. The reported judgment has overruled the ratio laid down by the Hon'ble Apex Court in its earlier judicial pronouncement in the matter of **Paparambaka Rosamma v. State of Andh.Pra.1999 AIR SCW 3440**. Shri Bodke placed reliance upon following observations, contained in head note.

" What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state

of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor, the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and truthful. "

. In fact, further observations in the same paragraphs read thus:-

" A certification by the doctor is essentially a rule of caution and therefore, the voluntary and truthful nature of the declaration can be established otherwise. "

. In fact, we must say that rigours of procedural aspect of recording dying declarations, which were imposed by earlier judicial pronouncements, were relaxed to quite a considerable extent by the ratio laid down by the Hon'ble Apex Court in the matter of **Laxman (supra)**. This is evident from observations in paragraph 5, which read:

" It is in deed, a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there

was no certification that the patient was in a
fit state of mind specially when the
magistrate categorically stated in his

evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. "

. Ratio laid down in the case of Laxman (supra), does not require the recording officer himself to satisfy fitness of the patient, even after the same is certified by the medical officer taking care of the patient. On the contrary, even if there is no certification by the medical officer, but in that case, if the recording officer has satisfied himself of fitness of the patient to make a statement, absence of certification by the medical officer, does not obstruct admissibility of the dying declaration and reliance upon the same, if found to be voluntary and truthful.

. In the matter at hands, the prosecution has not relied only upon the statements of the recording officers that they had consulted the medical officer and recorded the dying declaration only after the medical officer had certified fitness of the statement to make a statement to them, but the prosecution has also examined Medical Officer, who has supported the recording officers, about her having examined the patient and

having conveyed them fitness of the patient to make a statement.

. Even otherwise, Shri Mane (PW-2) has deposed that he put certain questions to the patient, asked her name, age, address, whether she was married, and he took down replies to these questions and thereafter he recorded the statement. Even the Head Constable Tate had asked patient, her name and address and only thereafter he had asked her to narrate the incident. Both the recording officers had ascertained the fitness of the patient to make a statement, with the assistance of the Medical Officer and thereafter, it was not necessary for them to independently assess and ascertain the fitness.

. Yet, it appears that they themselves had put preliminary questions to the patient, which satisfied them about patient being oriented and only thereafter they recorded the statements. We are unable to find any procedural flaw in recording the dying declarations by Havaladar Tate and Executive Magistrate Shri Mane. We are, therefore, unable to accept submissions of both the learned Counsel for the appellants that, possibly, the patient was not in a condition fit to make a statements or that, the statements were recorded without ascertaining such fitness of the patient. Merely

because Shri Mane did not introduce himself to the

patient, as Magistrate, or because he did not specifically question the patient whether she was physically and mentally fit, or because he did not mention in the statement, whether the patient was under any pressure or not, that by itself will not be sufficient to infer that the patient was not fit to make statement, or that the patient was making a statement under some pressure or influence. In fact, both the recording officers have confirmed that there were no relatives around the patient, when they recorded the statements.

10. Both the lawyers for the respective appellants have pleaded that a possibility of tutoring by the parents could not be ruled out and, therefore, the dying declarations are not reliable. As already pointed out, Exhibit 19 was recorded between 9.25 am to 9.55 am, and Exhibit 17 between 12.00 noon to 12.15 pm. We have already referred that both both the recording officers have confirmed that nobody was around the patient, when they recorded the respective dying declarations. In fact, as rightly observed by the trial court, there is reason to believe that the statement, as recorded by PW-Tate, was recorded even before any of the relatives of the deceased from parents' side had reached the hospital. On reference to deposition of Chandrakant

(PW-5), the father of the deceased, it is apparent that he got the message of Manisha having sustained burn injuries, at about 8.00 a.m. He is resident of Satara road, whereas the accused are residents of Koregaon. The civil hospital is at Satara proper. It was not disputed by the learned Counsel that Satara road is half way between Satara and Koregaon, a distance of about 20 kilometres. As per the narration of Chandrakant, upon getting message of daughter having suffered burn injuries, he, along with his wife and son, went to Koregaon, where they reached at about 9 or 9.30 am. At Koregaon, they learnt that Manisha was shifted to Civil Hospital and, therefore, they went to Satara and reached civil hospital at about 11.00 a.m. Thus, the parents of the deceased were required to travel about 8-10 kilometres from Satara road to Koregaon and then again about 20 kilometres from Koregaon to Satara proper, since getting the message. Even from the evidence of Medical Officer Dr. Shubhangi, it is evident that the victim was first taken to rural hospital, Koregaon and then referred to civil hospital, Satara, by rural hospital. Deposition of father certainly indicates that the victim was proceeding ahead and the parents were following the same path, with some time gap and this time gap must be at least equivalent to the time required for a journey of 10 kilometres. Manisha was admitted at civil hospital at Satara at 9.15 a.m. and

her statement was recorded at 9.25 a.m. Thus, the trial

judge was justified in arriving at a conclusion that there could have been no tutoring of Manisha, before recording dying declaration at Exh.19, by PW Tate. If that be correct, arrival of parents of the deceased at civil hospital, Satara, at about 11.00 am. before recording of Exh.17, is insignificant, because the core story narrated in both the dying declarations is one and the same i.e. the mother-in-law having poured kerosene and husband having ignited deceased Manisha.

. While arguing about possibility of tutoring, both the learned Counsel lost sight of the fact that, when the parents arrived on the scene at the civil hospital at Satara, Manisha was not alone. It is narrated by Manisha in both the dying declarations that the husband extinguished fire but only after she started shouting. Husband took her to primary health centre, Koregaon and then to civil hospital, Satara. Thus, Manisha was certainly accompanied by the husband from the residence upto the hospital. Following admission is obtained in the cross examination of Chandrakant, by the defence.

" It is true that the wife of brother of accused No. 1 had come to civil hospital, when the deceased was brought to hospital.

She stayed with the deceased in hospital for one day. "

We believe that recording to the effect that, the wife of brother of accused No. 1 is erroneous, to some extent. Probably, it is the wife of brother of accused No. 3. There is nothing on record to indicate that accused No. 1 has brother, or said brother and his wife were family members. On reference to deposition of Nanda, it is evident that she is paternal aunt (wife of paternal uncle) of accused No. 1. Nanda has narrated that, she herself and accused no. 1, initially went to Koregaon Government hospital and after primary aid there, they reached Satara civil hospital at about 9.00 am. Thus, there is reason to infer that, the lady referred to in the admission given by Chandrakant and who stayed with the victim for one full day, must be Nanda, i.e. the wife of brother of accused No. 3. If Nanda and accused No. 1 were around victim Manisha, possibility of parents tutoring daughter Manisha stands nullified, because in that case, there could have erupted quarrel between the two parties. If at all the defence wants us to believe the story of parents tutoring Manisha, suggestion or defence evidence to that effect ought to have followed by details of subsequent conduct of the parties, as influenced by that fact. It is not the claim, either of accused No.1, or defence

witness Nanda, that they had objected parents tutoring

Manisha or that they had brought this fact to the notice of either police, or Medical Officer.

. On this aspect, Advocate Shri Khamkar for appellant No.1, has placed heavy reliance upon admissions by PW-1 Dnyandeo Jadhav. In fact, this witness is examined as panch witness of the panchanama of scene of occurrence (Exh.14). In the chief-examination, he had half-heartedly supported the prosecution, but in the cross-examination, he was whole-heartedly with the defence. He has admitted that the house of defence witness Nanda is towards the western side of house of accused. Nanda and Subhash (accused No.1) accompanied Manisha in the rickshaw for shifting her to the hospital. Although he did not accompany them in the rickshaw, he proceeded one hour thereafter. We intend to quote some portion from the cross examination paragraph 3, which is relied upon by learned Counsel Shri Khamkar. Unfortunately, these admissions in the cross examination, are clear indicator of the fact that he is a witness won-over by the defence. He deposed;-

" I had seen the parents of the lady who had sustained burn injuries. They were making inquires. Ward-boy had told them to prepare

for statement as police were to arrive. It is true that the parents of the lady were talking to her and I was asked to go out. It is true that there was discussion between the parents of lady and the lady, and when police came, I was asked to go out. I do not remember whether the parents of the lady were there, when police came. It did not happen that the police came out with parents of the lady and asked me, my name. It is true that after the statement, police and the parents of the lady, came out. "

. Last two sentences clearly indicate that although with slight variation, the witness is making conflicting claims as to whether the parents of the victim and police came out together. It is not the claim of the accused or even Nanda, who was through out with the victim, that any ward-boy had cautioned parents to prepare the victim for statement. The over enthusiasm of the panch witness is evident in the claim and as in the case of accused No.1, as well as Nanda, there is no reaction on the part of this witness, narrated by him. It is not his case that he informed the Medical Officer, or the police that the deponent was tutored by her parents. Eventually, this witness also admitted that accused Nos.2 and 3 were staying separate

from accused No.1, however, according to him, they were

staying in a shed, owned by cousin of accused No.3 Parashram, hardly at a distance of 30 ft. from the house occupied by accused No.1. The distance is not such from where, the parents could not have reached the house of accused No.1 and according to written statement, parents were residing in a newly constructed house and not in the shed, owned by cousin of accused No.3. Eventually, this is the first instance of raising false defence on the part of accused persons.

. For the reasons discussed hereinabove, we have reason to believe that PW-1 Dnyandeo is a witness totally won-over by the defence, without any inkling to the prosecution about the same. Manisha was admitted in hospital at 9.15 am. and her dying declaration was recorded at 9.25 am i.e. within 10 minutes from reaching hospital. Yet, it is the claim of PW-1 Dnyandeo that he had witnessed wardboy cautioning parents of the deceased for tutoring her, although he had followed them after one hour. Hence, admissions by Dnyandeo are incapable of serving the cause of defence.

11. Advocate Shri Khamkar, relied upon the admissions of the father and material on record, and prayed for an inference that the couple was a happy married couple, without the deceased having any grievance against the husband. Father Chandrakant in

his cross examination, has admitted that, the deceased had informed him that she was pregnant and every one was happy on learning this. Post mortem notes, and more particularly column No.21 thereof, confirm this, since cut section of uterus, which was bulky, showed signs of conception. Father further admitted that, he advised the husband of the deceased and his family members to take care of Manisha's pregnancy and provide her proper medical treatment. Father himself did not take her for regular medical checkups, but accused No. 1 took her for medical treatment. If these are the signs that the husband was taking care of the wife and, therefore, had no reason to kill her, the pregnancy certainly rules out possibility of suicide and this aspect assumes importance for the purpose of considering defence evidence, in the form of deposition of Nanda, to which we shall come little later. The moot question we must ask ourselves is that, if everything was well and couple was leading a happy married life, what was the driving force by which the father could have persuaded the daughter Manisha to make false allegations against the husband, which were capable of making him suffer life imprisonment. The possibility of false implication, as a result of tutoring, does not exist for the reasons stated above and if the couple was leading happy married life, then such possibility stands further ruled out.

The married life of Manisha was not sailing smooth, would be a factor, if we are inclined to believe the dying declarations and if the husband had suspicion against fidelity of the wife, pregnancy could have aggravated the suspicion, as is evident from the contents in Exhibit 19, wherein she has narrated of husband accusing "_____ " i.e. " you are having illicit relations with some one." We are neither inclined to believe the suggestion that the dying declarations were result of tutoring, nor we are inclined to accept that the matrimonial life of Manisha was sailing smooth, merely because husband had taken her to doctor for medical checkup after knowledge of pregnancy.

12. Advocate Shri Bodke for mother-in-law, tried to compare the text of two recorded dying declarations, in order to persuade us that the two recorded dying declarations are at variance and, therefore, not reliable. Advocate Shri Khamkar added to the argument, by referring to the deposition of father Chandrakant and pointing out that Chandrakant has created a major deviation from the recorded dying declarations.

. On comparison of the text of exhibits 17 and 19, so far as main incident is concerned, in both the dying declarations, Manisha has claimed that the husband

and in-laws had been quarrelling with her since earlier night and on 21.9.1999 at about 6.00 a.m., mother-in-law poured kerosene on her person and husband ignited her, by using a matchstick. The narration regarding ill-treatment, prior to the alleged incident, is somewhat in more details in Exhibit 19 than in Exhibit 17, but in both the dying declarations, she has referred to drinking habit of the husband and his expressing doubt about her character and she having returned to parents on couple of occasions, due to such conduct of the husband. Variance, if any, is about occurrence on the night of 20.9.1999. In Exh.17, the victim has said that mother-in-law was consistently abusing her, whereas in Exhibit 19, she has claimed that all three accused were abusing her and beating her. Except this minor variance, there is no difference in the two recorded dying declarations and the two are not verbatim copy. In both the dying declarations, she has claimed that, she was extinguished by husband and husband has suffered burn injuries to his hands, in the process. She has also narrated that the husband only took her to primary health centre, Koregaon and then to civil hospital, Satara. We are unable to accede to the argument of Advocate Shri Bodke that the two dying declarations are at so much variance, as to make those unworthy of belief.

. Advocate Shri Khamkar has pointed out that father claimed to have heard oral dying declaration of

Manisha and in his evidence, he claims that Manisha told him of accused No. 2 and 3 having caught hold of her and husband having ignited her. Eventually, both the recorded dying declarations do not attribute any overtact to father-in-law i.e. accused No.3 (acquitted). Certainly, Shri Khamkar has, by reference to cross examination of the father, brought on record his tendency to improve and exaggerate. The entire paragraph 2 of chief-examination, regarding past history of ill-treatment, has come on record as a result of improvement over and above the police statement. His narration that he reached civil hospital at 11.00 a.m. and at that time, daughter informed him being of empty stomach for last two days, are also improvements. This may make the father an unreliable witness. But, unreliability of the father, will not be sufficient to discredit the recorded dying declarations, which are the statements of deceased Manisha, fully supported by recording officers, as also the medical officer.

13. Shri Khamkar has laid heavy emphasis on the subsequent conduct of the accused. He pointed out that, as per the recorded dying declarations, the husband extinguished the fire. He also secured medical

attendance, by taking her to primary health centre and then to civil hospital. Admittedly, he was also providing appropriate medical attendance, in view of pregnancy of the victim. According to Shri Khamkar, this conduct of the accused/husband is not compatible with his guilt, but the same demonstrates his innocence. Certainly, the two recorded dying declarations give credit to the accused of extinguishing the fire and taking the victim to primary health centre and then to civil hospital. The defence is inclined to believe this portion of the dying declarations, as truthful, while assailing the dying declarations, as having been recorded when the patient was not in a fit condition to make a statement, or while it being involuntary and truthful. We feel that the portion, upon which the defence is tempted to rely, certainly lends an assurance to the recorded dying declarations, by ruling out possibility of tutoring, or dying declarations being untruthful. Such exonerating contents, confirm the dying declaration to be voluntary and truthful. If father had tutored, or if the deceased desired to frame the husband, (and for the reasons unknown to the defence, in case the marital life was smooth and normal), there was no need to incorporate these contents. This clearly indicates that the action of extinguishing the fire was a result of belated repentance. One cannot rule out that securing medical

assistance could have been aimed at gaining sympathy of

the victim and also ensuring against deceased making any inculpatory statement to any one, against accused. The husband, or his relatives, who are responsible for bride burning, accompanying the victim to the hospital, in order to ensure that the victim does not make any inculpatory statement, is not a rarity. Accused or appellant-husband in the present case, had so planned, by being together with the victim right upto the hospital, is evident from the defence evidence and medical papers.

. Evidence of defence witness Nanda is relied upon by Advocate Shri Khamkar, in order to claim that, Manisha had sustained burn injuries as a result of accident. According to Nanda, she had reached the location within five minutes since hearing shouts of a woman (presumably of Manisha) and when she made her way to the victim through the crowd gathered, she spoke to Manisha. According to Nanda, Manisha narrated a story that while she was keeping a water pot on the earthen fire place, one side of the fire place collapsed and the water pot fell down. Manisha lost balance and part of her sari caught fire. If at all, the earthen fire place collapsed, resulting into water pot falling down, ordinarily; there is every possibility of extinction of fire by water spilling out from the pot. But falsehood

of this story is eloquent when we refer to medical papers at Exhibit 39.

. The medical case record shows that, relative of accused No. 1 husband, was accompanying the patient and history of suicidal burn was informed. When the patient was brought by relatives and name of accused No. 1 Subhash is recorded as the relative accompanying the patient, only logical inference that can be drawn is that, the relative accompanying the patient, gave the history. This explains the reason why the accused was eager to accompany the victim to civil hospital. The victim herself is most unlikely to give history of suicide, even if it be a case of suicide, because an attempt to commit suicide is also an offence. If Manisha had narrated a story of accident to Nanda, she was most unlikely to give history of suicide and thus the conclusion that the history must have been given by the accused, is justified. The case paper, therefore, demonstrates that there was an attempt on the part of accused to create false evidence and this is one circumstance, which frustrates all attempts on the part of learned Counsel for appellant to demonstrate innocence of the accused, on the basis of either admissions of prosecution witnesses, or evidence of defence witness Nanda.

14. Shri Khamkar has placed reliance upon

admission by Medical Officer Dr. Shubhangi that when the patient was admitted in the hospital, the mother of the patient was informed about the serious condition of the patient. The admission is supported by case papers produced at Exhibit 39. On these case papers, there is an endorsement on 21/9/1999 of intimation to mother Padma Chandrakant Phalke, of seriousness of patient Manisha. On the same paper, there is also intimation on 26/9/1999 at 1.00 p.m., which appears to be intimation to the uncle of the deceased, also regarding serious condition of the patient. Between these two endorsements, there is another endorsement on 26/9/1999 at 4.30 p.m., of dead body having been sent for post mortem. The medical officer Dr. Shubhangi, admitted intimation to the mother of the victim, regarding seriousness of her condition, upon admission and she must have so admitted, on the basis of the endorsement on the case papers, and not on the basis of memory. Three endorsements referred hereinabove, clearly indicate that the record is not being kept in a very tidy manner and the three endorsements are not necessarily at the chronological location, where those ought to be. The admission by medical officer, therefore, cannot be accepted as accurate in terms of time factor, so as to enable us to infer that the intimation must have been immediately after admission

and, therefore, the mother was present at the time of admission. We have already observed earlier that, patient was admitted to the civil hospital by husband Subhash, accompanied by defence witness Nanda and presence of both the parties certainly rules out possibility of tutoring to the victim. At the cost of repetition, we must say that, by tutoring, a pregnant wife and bride of 10 months married life, could not have been persuaded to falsely implicate the husband, if he was not the culprit.

15. Dr. Shubhangi, in her cross examination, has admitted that the kerosene burns give specific odour of kerosene and she has not mentioned existence of kerosene odour in the case paper of Manisha. The argument advance on the basis of this, was aimed at discrediting the dying declarations, because in both the dying declarations, the victim claims mother-in-law pouring kerosene upon her person and thereafter husband having ignited her. Admission can be seen to be omission on the part of the medical officer to record accurate observation. This is because, at Exhibit 34, there is report of Forensic Science Laboratory, which indicates that, from the sample of the soil collected at the location, as also partly burnt cloth piece, which were forwarded for analysis, results for detection of kerosene residue, were positive. On this aspect, we can

also refer to panchanama of the spot, which was shown by

accused No. 1 himself. The panchanama referred to attachment of soil near the fire place, smelling of kerosene, as also burnt sari piece smelling of kerosene and both these samples upon analysis, were found to be containing traces of kerosene. The admission of medical officer is, therefore, required to be ignored as failure on her part to make accurate observations.

16. It was submitted by Advocate Shri Khamkar that, in the light of defence evidence in the form of deposition of witness Nanda, the appellants have successfully created two possibilities. Against the claim of prosecution about homicide, the defence has created possibility of accident and, therefore, the benefit of doubt must go to the accused. For supporting this argument, it was also pointed out by the learned Counsel that, as per the admission by Investigating Officer Shri Balkrishna Shinde, Nanda was one of the persons whose statements were recorded during the course of investigation. The learned Counsel desired the court to draw an adverse inference because the prosecution did not examine Nanda. We are unable to agree with such a submission. Nanda being real paternal aunt of accused No. 1, was most unlikely to support the prosecution and, therefore, learned APP in the trial court, was justified in not taking risk of putting Nanda in witness

box, as the prosecution witness. Being handicapped by proviso to Section 162(1) of the Code of Criminal Procedure, the prosecution could not cross examine Nanda, by confronting her with the portions of her statement, as recorded by the police. This is because, apparently such statement is for the purpose of contradicting the witness, as provided by Section 145 of the Indian Evidence Act, when the maker of the statement enters the witness box as prosecution witness. In any case, there would be two possibilities from the fact that the statement of Nanda was recorded during the course of investigation. One, in the statement before the police, she had spoken against the accused, yet the learned APP was not sure that she would support the prosecution, if asked to enter the witness box. Secondly, even during the investigation, Nanda did not make any inculpatory statement against the accused. Thus, the fact that the statement of Nanda was recorded during the course of investigation, but she was not examined by the prosecution, would not damage the merits of the prosecution case. The argument that, the deposition of Nanda creates two possibilities, is also untenable. Rules of evidence apply equally to defence witnesses. If Nanda is a witness worthy of belief, then her statement would supersede the deposition of prosecution witnesses and entitle the accused for acquittal, even without creating two possibilities. On

the contrary, evidence of Nanda, if found reliable, would give the accused a clean chit. But, if her evidence is unreliable, would not be sufficient to create probability of theory propounded by the defence. We have already recorded that, the history of suicidal burns registered in the case paper of Manisha at the time of her admission in the hospital, presumably by the husband, indicates that there is an attempt on the part of the defence to create evidence, supporting false theories. The inconsistent theories pleaded by the accused, can be taken into account as one additional circumstance against them.

17. Shri Khamkar, learned Counsel for appellant No.1, has placed reliance on few judicial pronouncements, wherein the courts were required to consider more than one dying declarations.

. In the matter of Kamla v. State of Punjab, AIR 1993 S.C.374, there were four dying declarations, and inconsistent with each other. In the first, the mother-in-law was indicted as person sprinkling kerosene and igniting the victim. The second dying declaration created a possibility of accidental fire. The third one was vague and only a possibility was suggested, of mother-in-law having set the victim on fire, after pouring kerosene. In the fourth statement, the victim

was certain, of parents-in-law having poured kerosene. Apart from divergence of details in four recorded dying declarations, which indicted only parents-in-law, husband had deposed that the parents were away to Dandi Swami Mandir, on the day of occurrence.

. In the matter of Dandu Laxmi Reddi vs. State of A.P., 1999 Cri.L.J.4287, the Hon'ble Apex Court observed thus:

" When the sphere of scrutiny of dying declaration is a restricted area, the Court cannot afford to sideline such a material divergence relating to the very occasion of the crime. Either the context spoken to in one was wrong or that in the other was wrong. Both could be reconciled with each other only with much strain as it relates to the opportunity for the culprit to commit the offence. Adopting such a strain to the detriment of the accused in a criminal case is not a feasible course. "

. Holding that it would be unsafe to convict any person on the strength of fragile and rickety dying declarations, the appellants were acquitted. In this reported matter, there were two recorded dying

declarations at Exhibits P-14 and P-11. In Exhibit P-14, recorded by police officer, the victim claimed that, while she was in the kitchen, the mother-in-law and the husband came there, husband caught hold her hair and she was unable to move, mother-in-law sprinkled kerosene on her body and clothes and asked the son to set her on fire, whereupon the husband lit the matchstick and threw the same on the person of the victim.

. In Exh. P-11, the story narrated was altogether different. Here, the victim claimed to be sweeping (and not in the kitchen) at the material time and both, husband, as also the mother-in-law, were alleged to have poured kerosene and set her on fire. It was in the light of divergent stories coming from the same declarant, which could not be reconciled without strain, the Hon'ble Apex Court was not inclined to believe the dying declarations. In fact, from paragraph 9 of the judgment, it is evident that, all other witnesses, except police officer and the Magistrate recording the dying declarations, had deposed of victim Laxmi having said that her clothes caught fire while cooking milk and this parade of witnesses included her parents.

. Lastly, reliance was placed on the judgment of

the Division Bench of this Court at Aurangabad, to which one of us (N.V. Dabholkar) was a party, reported at **2006 ALL MR (Cri) 138 (Meerabai Rangnath Shriram vs. State of Maharashtra)**. In this matter, the victim Vandana was sister-in-law of appellant Meera. Medical Officer at Newasa, where the victim was first admitted, had recorded history of burns by explosion of stove. The dying declarations were recorded by Naib Tahsildar and the Head Constable, after admission of Vandana at Civil Hospital, at Ahmednagar. In fact, in all, there were five dying declarations on record. The Medical Officers at Newasa, as also at Ahmednagar, had recorded history as given by the victim Vandana and she was said to have made a statement to her father, inculcating the appellant. The bone of contention raised on behalf of the appellant was that, the manner in which the incident took place, was not consistent in the different dying declarations. In the reported matter, the history recorded by both the Medical Officers at the instance of the victim, was exculpatory. It was an additional circumstance, apart from variance between the two dying declarations, as recorded by Naib Tahsildar and Head Constable. In the dying declaration recorded by Naib Tahsildar, it was claimed that the victim was simply sitting near the fire place, when the appellant poured kerosene upon her person from the back-side and ignited her. In the dying declaration recorded by the Head

Constable, the victim claimed that she was trying to ignite fire place early in the morning, when the appellant poured kerosene on her person. Kerosene also fell on the country-fire, due to which there was a sudden flair of burning fire and her sari caught fire. In this dying declaration, action of igniting the victim was not attributed to the appellant.

. Thus, it is evident that in all the reported matters, the dying declarations of the victim, were divergent and could not be reconciled. In the matter at hands, the dying declarations at Exhibits 17 and 19 of the victim, are quite consistent and, therefore, the observations in neither of the reported cases, can be helpful to the present appellants. The variation, as brought on record by deposition of father Chandrkant, is required to be ignored as exaggerated version, as already discussed earlier.

18. Both the learned Counsel for the respective appellants, urged that in view of the fact that, accused No. 1 himself attempted to extinguish fire, it should at least be held that this is an offence punishable under Section 304 (II) and not one under Section 302 IPC. It was urged that this subsequent conduct of the appellants indicates absence of intention to cause death or to cause such bodily injury, as is likely to result

into death.

. Advocate Shri Khamkar also placed reliance on the judgment of another Division Bench of this High Court at Nagpur Bench, in the matter of **Suresh Vithal Ballal vs.State of Maharashtra, 2004 All MR (Cri.) 664.**

. In the reported matter, although the victim died of burn injuries and although the accused were found to be perpetrators of crime, because they tried to extinguish the fire by pouring water on the deceased and in the absence of opinion of the medical officer that the burn injuries were sufficient in the ordinary course of nature to cause death; it was held that the crime in question would fall within the purview of Section 304 (II) IPC.

. In view of the observations of the Hon'ble the Apex Court, in the matter of **Virsa Singh v. State of Punjab, AIR 1958, 465,** we find it difficult to take the same view as taken by Nagpur Bench of this High Court. In paragraph 13 of its judgment, the Supreme Court has observed :-

" Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental. "

. In the light of above observations of the Supreme Court, absence of opinion in the words of Medical Officer that the injuries were sufficient in the ordinary course of nature to result into death, is not a handicap. Medical Officer in the present case has at least opined that the death was result of septicaemic shock due to 51% superficial to deep burns. Death being the result of burn injuries, is a fact on record and, therefore, merely because the doctor did not utter, "

the injuries were sufficient in the ordinary course of nature to result into death", would not be sufficient to draw an inference that the accused intended only to cause some minor injury. Such an inference may be possible if the injury is inflicted by violence, by use of weapon, but when one sets another to fire, it is difficult to presume that only some minor injuries, not likely to cause death, were intended.

. The intention of the perpetrator is required to be gathered at the time of act, which resulted into death. Subsequently, the accused persons attempted to save the victim, would not in any way, reduce acidity of the intentions those existed, while setting the victim on fire and if the victim-wife was set on fire by the husband and his mother, it would be logical to presume that they intended her death. Subsequent contra reaction can only be belated repentance. If they intended death, while committing the act in question, neither subsequent attempt to save, nor complications in the health, during the course of treatment, would bring down the severity of the charge and the offence. Otherwise also, in the reported matter, the medical officer was not at all examined. The victim had sustained 48 per cent burns and had survived for more

than a month from the date of the incident.

. In the matter at hands, what the medical officer had forgotten to narrate during his chief - examination, the defence has brought on record during his cross examination, although indirectly. In the chief examination, doctor had not said that the injuries were sufficient in ordinary course of nature to result into death. However, he has recorded that those were 51 per cent burn injuries. In his cross examination, the defence has obtained it on record, " It is true that the burns about 35 per cent are fatal.". This impliedly brings on record that the injuries suffered by the victim in our case, were sufficient to result into death, in the ordinary course of nature.

. We are, therefore, not inclined to accede to the submission of the learned Counsel for the appellants that the offence would be of any lesser severity than the one, under Section 302 of Indian Penal Code. The appeal, so far as it challenges conviction under Section 302 read with 34 of Indian Penal Code, therefore, fails. Hence, the order.

19. The appeal is partly allowed.

. The finding of guilty, conviction and sentence, imposed upon appellant Subhash-original accused No.1, so far as offence punishable under Section 498-A IPC is concerned, the same is quashed and set aside. He is acquitted of the said charge, by allowing the appeal to that extent.

. So far as finding of guilty, conviction and sentence imposed upon both the appellants for offence punishable under Section 302 read with 34 IPC is concerned, the same is confirmed, by dismissing the appeal to that extent.

. Registrar (Judicial) shall ensure supply of one certified copy to each of the appellants, free of costs; through prison authorities.

(V.K.Tahilramani, J.)

(N.V.Dabholkar, J.)

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